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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DAVID LOWERY, VICTOR
KRUMMENACHER, GREG LISHER, and
DAVID FARAGHER, individually and on
behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

RHAPSODY INTERNATIONAL INC.,

Defendant.

Case No. 4:16-CV-01135-JSW

**DEFENDANT RHAPSODY
INTERNATIONAL INC.'S BRIEF IN
SUPPORT OF, AND PROVIDING
ADDITIONAL INFORMATION
RELEVANT TO, FINAL APPROVAL**

Date: July 17, 2020

Time: 9:00 AM

Courtroom: 5

Complaint filed: March 7, 2016

TABLE OF CONTENTS

Page

I.	This Is A Claims-Made Settlement Without A Fund; Those Claims Total \$55,032	1
II.	The Case Was On a Clear Path To Settlement From The Beginning	2
III.	The Settlement Is Generous to Those Class Members Who Participated	3
IV.	Section 115 Has Been the Subject of Congressional Reform Efforts Since the Advent of Digital Music Services in the Early 2000s	3
V.	Plaintiffs Misstate the Settlement Provisions Related to the Artist Advisory Board	6
VI.	Rhapsody’s NMPA Agreement Wipes Out Plaintiffs’ Class, and Its Negotiation Long Predated This Litigation.....	6

1 Defendant Rhapsody International Inc. (“Rhapsody”) joins Plaintiffs and “unambiguously
2 recommend[s] this Settlement as fair, adequate, and reasonable and respectfully ask that it is given
3 final approval.” Plaintiffs’ Final Approval Brief, Dkt. 207 (“FA Brief” or “FA Br.”), at 14. In
4 addition, Rhapsody submits information which it believes is important context for the claims
5 participation rate, among other things.

6 **I. This Is A Claims-Made Settlement Without A Fund; Those Claims Total \$55,032**

7 Plaintiffs contradict themselves when describing the nature of this settlement. In their Final
8 Approval brief they correctly state it is a “claims made settlement without a fund.” FA Br. 3. But
9 in their Motion for Award of Attorneys’ Fees and Costs, Dkt. 208 (“Fee Motion” or “Fee Br.”), they
10 falsely claim it includes a \$20 million fund. Fee Br. 1, 9, 12–13. Because Plaintiffs also state several
11 times in their Final Approval brief that Rhapsody’s “liability” under the settlement was \$10 to \$20
12 million, FA Br. 3, 7, 10–11, Rhapsody writes to set the record straight. This is a claims made
13 settlement; there is no common fund of any amount, let alone \$20 million. This is not an arguable
14 point.

15 The Settlement Agreement contains no floor on payments, but it does provide a backstop
16 cap if claims exceeded \$10 million. Dkt. 207-2, Ex. A (“SA”) ¶ 32. Although Plaintiffs claim the
17 cap represents the maximum amount Rhapsody could pay based on its financial position, FA Br. 3,
18 Plaintiffs cite nothing to back that up and it is not true. Nor does \$10 million have any relationship
19 to the amount of expected claims. To the contrary, Rhapsody repeatedly advised Plaintiffs that the
20 total claims in this case would be small, principally because (1) royalties owed the vast majority of
21 class members were well under one dollar (FA Br. 9, 11–12), (2) Rhapsody had licenses in place
22 for a substantial number of the mechanical rights at issue here, and (3) a separate industry-driven
23 agreement being engineered by the National Music Publishers Association (“NMPA”) was already
24 in process and would cause Plaintiffs’ class to dwindle to almost nothing, just as it has (Dkt. 158 at
25 4–5). The NMPA settlement addressed the exact same claim as Plaintiffs’ case and required the
26 large number of copyright owners in musical works that opted in to grant licenses and release
27
28

1 Rhapsody from the claim in this lawsuit.¹

2 As Rhapsody predicted, the claims in this action are miniscule, particularly compared to the
3 ruinous damages Plaintiffs kept promoting in their submissions to the Court. In their Final Approval
4 brief, Plaintiffs’ detailed total *number* of claims only. FA Br. 4. They failed to apprise the Court of
5 the number of unique claimants (209) or the *dollar amount* that corresponds to those claims:
6 \$50,032. See Supplemental Declaration of Jonathan P. Shaffer, *filed concurrently herewith*
7 (“Shaffer Decl.”), ¶¶ 14-16.

8 In a transparent effort to inflate the class recovery and justify an unreasonable fee request,
9 Plaintiffs falsely claim that “Class Counsel has achieved a net settlement fund of \$20,444,567,” Fee
10 Br. 1, later describing it as “a gross settlement fund [of] \$20,341,500,” *id.* 9. These statements
11 willfully misrepresent the terms of the settlement, and, as shown above, contradict Plaintiffs’ own
12 description of the settlement. And, importantly, their statements here violate Paragraph 86 of the
13 Settlement Agreement, which explicitly provides: “Plaintiffs will not claim in any manner that [cap]
14 provision changes the settlement cap to a fund.” SA ¶ 86; *see also id.* ¶ 32 (no issue of reverter).
15 No amount of obfuscation or deception can change the fact that this is a claims made settlement
16 without a fund, and that Rhapsody will be paying a total of \$55,032 to the class.

17 **II. The Case Was On a Clear Path To Settlement From The Beginning**

18 Plaintiffs filed this action on March 7, 2016, over four years ago, alleging Rhapsody violated
19 the compulsory mechanical license provisions of Section 115 of the Copyright Act. Congress had
20 recognized many years ago those requirements were outdated and that it was impossible for digital

21
22 ¹ Plaintiffs again make an absurd claim, contradicted by the Claim Form and their own prior
23 statements, challenging whether Rhapsody’s NMPA agreement overlapped with and greatly
24 diminished this class. Dkt. 208-3 (Mauri Decl.) ¶ 35. Plaintiffs’ Complaint alleged that Rhapsody
25 infringed musical works of copyright owners by failing to comply with the compulsory license
26 requirements of Section 115. See Dkt. 1 at 2, 8. The NMPA represents the biggest copyright owners
27 of musical works, and the Rhapsody-NMPA agreement, like the similar Spotify-NMPA agreement,
28 resolved claims that the company failed to comply with the compulsory license requirements of
Section 115. See Dkt 158 at 4–5. The claims of infringement and the rightsholders in musical works
are identical, so much so that those copyright owners that participated in the NMPA agreement
cannot make a claim and participate in this settlement. See Claim Form at 1 (“You are not eligible
to submit a claim for a work if...[y]ou participated in the [Rhapsody-NMPA] settlement,” Dkt 155-
5 at 61.

1 music streaming services to comply with them. *See* Dkt. 158 at 1–2. Rhapsody explained from the
 2 start of the case that it was highly motivated to settle promptly and efficiently because it was in a
 3 difficult position financially and wanted to avoid expensive class action litigation. It also knew, and
 4 told Plaintiffs (and the Court), that a settlement with the NMPA, which already was in process when
 5 Plaintiffs sued Rhapsody, would wipe out their class. That alone made it crystal clear that this was
 6 not the big ticket case Plaintiffs believed it to be. Hence, as Plaintiffs admit, Rhapsody immediately
 7 proposed a settlement discussion and then a mediation, Fee Br. 2, discovery was largely stayed
 8 throughout the entirety of the case, FA Br. 12, and the parties agreed to all of the fundamental terms
 9 of the settlement by May 2017, over three years ago, *id.* 15.

10 **III. The Settlement Is Generous to Those Class Members Who Participated**

11 The Settlement Agreement provides generous payments to claimants: \$35 per registered
 12 work and \$1 per unregistered work for those musical works underlying the sound recordings
 13 provided by Rhapsody’s record label partners as to which Rhapsody (or the Harry Fox Agency as
 14 Rhapsody’s administrator for mechanical licenses) was unable to identify the copyright owner. FA
 15 Br. 2; SA ¶¶ 30–31. Actual royalties owed to those copyright owners are under \$1 per work. FA
 16 Br. 9, 12. Owners of unregistered works were not entitled to sue by law, so payment to them under
 17 the settlement was unnecessary but beneficial to them as rightsholders—and consistent with
 18 Rhapsody’s policy of paying rightsholders even where the works are not registered because it is the
 19 right thing to do. FA Br. 11. Without the inclusion of unregistered works, the total of claimed
 20 works that were valid would have decreased from 4,426 to 1,320. Shaffer Decl. ¶ 14.

21 **IV. Section 115 Has Been the Subject of Congressional Reform Efforts Since the Advent** 22 **of Digital Music Services in the Early 2000s**

23 The Rhapsody music service was launched in 2001 and was the very first digital music
 24 service to offer an on-demand music subscription service featuring music from all recognized major
 25 record labels for a flat fee. *See* Dkt. 208-3 (Mauri Decl.) ¶ 3. As Plaintiff David Lowery has noted,
 26 Rhapsody has always been viewed as being very supportive of artists and copyright owners, and is
 27 “[t]he highest-paying streaming service.” @DavidCLowery, TWITTER (April 4, 2019, 10:20 AM
 28 <https://twitter.com/davidclowery/status/1113808558905286656>). As a digital music streaming

1 pioneer, Rhapsody has known firsthand the disservice to all industry participants—including the
 2 artists, songwriters and publishers—of applying an outdated compulsory license scheme to the
 3 speed and scale of digital music services, and has been an active participant in Congress’s efforts to
 4 amend Section 115 for many years before this litigation began.

5 Contrary to Plaintiffs’ assertion in their Fee Brief (at 7–8), the issues raised in this case are
 6 by no means novel. Over a year before this case was filed, in February 2015, the Copyright Office
 7 released its landmark report “Copyright and the Music Marketplace,” which concluded that “[o]ur
 8 licensing system is broken” and “accurate, comprehensive, and accessible licensing information . . .
 9 [is] essential to a better functioning music licensing system.” U.S. Copyright Office, “Copyright
 10 and the Music Marketplace,” at 1, 183, *A Report of the Register of Copyrights*, February 2015,
 11 available at [https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-](https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf)
 12 [marketplace.pdf](https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf). Specifically, the Copyright Office proposed “an updated framework for the
 13 licensing of musical works,” *id.* at 9, and forwarded recommendations for reform to Congress for
 14 its consideration, *id.* at 201–02.

15 That 2015 report was built on years of Congressional and Copyright Office study of the
 16 inherent impossibility that the compulsory license regime presented to digital music services like
 17 Rhapsody. At a House Judiciary Committee hearing considering the “Section 115 Reform Act”
 18 back in 2006, for instance, Register of Copyrights Marybeth Peters testified about this precise issue:

19 [T]he existing section 115 does not comport with the realities of the
 20 digital environment in which music creators, distributors and users
 21 now operate... The most critical and time-sensitive issue is the current
 22 unavailability of an efficient and reliable mechanism whereby
 23 legitimate music services are able to clear all of the rights they need
 to make large numbers of musical works quickly available by an ever-
 evolving number of digital means while ensuring that the copyright
 holders are fairly compensated....

24 U.S. House of Representatives, 109th Congress, 2nd Session, Statement of the U.S. Copyright
 25 Office before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on
 26
 27
 28

1 the Judiciary, May 16, 2006;² *accord* FA Br. 1 (“the Class likely contains thousands of members
2 with unknown identities and/or addresses”).

3 Following the release of the Copyright Office’s 2015 report, Congress took up the issue and,
4 in October 2018, enacted the Music Modernization Act, which completely does away with the
5 inoperable music licensing scheme that is the focus of this lawsuit and provides for blanket licensing
6 of musical works. 17 U.S.C. § 115(d). Plaintiffs’ claim that this lawsuit led to the consideration
7 and enactment of the MMA, *see* Fee Br. 8, is a fictional rewrite of this well-documented history.

8 At its core, the MMA changes the business practices of every player in the digital music
9 ecosystem in relation to mechanical licenses, from copyright owners to licensing agencies to music
10 services. See Dkt 160 at 4 (Plaintiffs’ acknowledgement that “the MMA changed the music
11 licensing landscape”). Like others, Rhapsody’s business and licensing practices will fundamentally
12 change because the MMA eliminates the old and unworkable Notice of Intent procedure with a new
13 blanket license. 17 U.S.C. § 115(d). Ignoring the MMA, Plaintiffs would have this Court believe
14 that the Settlement Agreement led to changes in Rhapsody’s practices, Fee Br. 4, 10, but that is
15 unsupportable and untrue. There is no injunctive relief in the Settlement Agreement and nothing
16 that requires Rhapsody to change its practices to meet Section 115. The MMA alone does that.

17 Nor is this litigation novel. The same lawyers who brought this suit first sued Spotify in the
18 Central District of California, and Spotify was also sued by other law firms before this case was
19 filed.³ In fact, the complaint Plaintiffs filed against Rhapsody is a virtual carbon copy of their
20 previously filed complaint against Spotify. *See Ferrick v. Spotify USA Inc.*, No. 16-cv-08412
21 (S.D.N.Y.), Dkt. 1. Moreover, even if the filing of the case had been a novelty, none of the “novel”
22 issues that might have been raised were raised in this case, as the case immediately moved into
23 settlement discussions.

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25
26 ² Available at <https://www.copyright.gov/docs/regstat051606.html>.

27 ³ In the Spotify case, Plaintiffs’ case was consolidated with other cases; Plaintiffs’ counsel here
28 was rejected as class counsel; and it was eventually awarded zero in attorney’ fees after making a
claim for \$3,699,148.75. *Spotify USA Inc.*, No. 16-cv-08412 (S.D.N.Y.), Dkt. 418 at 24–25.

V. Plaintiffs Misstate the Settlement Provisions Related to the Artist Advisory Board

As part of the Settlement Agreement, Rhapsody will create an Artists Advisory Board (AAB) and fund it with \$30,000. SA ¶ 49. The precise role and function of the AAB, which, as its name demonstrates, is an *advisory* board, are delineated as follows: “The AAB shall be designed to advance the parties’ mutual goals of improving and protecting artists’ rights, promoting Rhapsody’s service as an artist-friendly platform and thereby growing its subscriber base, and providing compensation to artists.” *Id.* Plaintiffs’ submissions to the Court, however, misrepresent the scope of the AAB and invent out of thin air responsibilities that appear designed to inflate its role. Plaintiffs claim that the AAB “is designed, *inter alia*, to provide oversight,” Fee Br. 1, and “will, *inter alia*, be used to provide internal oversight over Rhapsody’s behavior that led to this action,” *Id.* at 10. That is false; the Settlement Agreement contains no such provision.

VI. Rhapsody’s NMPA Agreement Wipes Out Plaintiffs’ Class, and Its Negotiation Long Predated This Litigation

As explained earlier, prior to the initiation of this litigation, Rhapsody had been engaged in extensive discussions with the NMPA, whose members are leading music publishers and other large copyright owners of musical works, who would otherwise be members of the class in this case. Dkt. 158 at 3. The Rhapsody-NMPA agreement wiped out Plaintiffs’ class, as copyright owners in musical works with an approximately 97% market share opted into that agreement. *Id.* Importantly, participants in that agreement explicitly waived their right to join the class in this case and to participate in the settlement. *See* Dkt. 155-5.

Plaintiffs’ submission mentions the Rhapsody-NMPA agreement, but distorts it beyond recognition to claim that Rhapsody’s settlement with the NMPA shows that “Rhapsody was insecure in its ability to prevail in this case.” Fee Br. 8. Neither Rhapsody nor its counsel has any idea what that means. If it shows anything, it is that Rhapsody is a good citizen in the industry and has always worked with the industry players to solve the intractable problem of Section 115 and ensure the efficient payment of royalties to copyright owners.

1 DATED: June 26, 2020

Respectfully submitted,

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4
5 By /s/ Karin Kramer

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